No. 14,659

IN THE

United States Court of Appeals

For the Ninth Circuit

HERALD E. STRINGER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant, who is an attorney at law, was charged in an Information, filed by the United States Attorney, September 24, 1953, with misconduct while in practice of his profession. After a hearing in District Court, appellant was found delinquent in those obligations required of him when dealing with his client, and was suspended from the practice of law for 120 days. The execution of the punishment has been stayed, and from the judgment he has now appealed.

Jurisdiction of the Court below is found at Section 35-2-73 of the Alaska Compiled Laws of 1949. Juris-

diction of this Court is found at 28 U. S. C. 1291 and 28 U. S. C. 1294.

STATEMENT OF FACTS.

The appellant is an attorney at law licensed to practice his profession within the Territory of Alaska.

An Information was filed the 24th of September, 1953, by Seaborn J. Buckalew, then United States Attorney, charging appellant with misconduct while in practice of his profession.

Mr. Stringer had been employed and had undertaken to represent Robert Lee Kemp in a criminal matter (United States v. Robert L. Kemp). Kemp was taken into custody May 6, 1952, by police officers at Anchorage, and charged with transporting a woman for the purposes of prostitution. The charges filed against Stringer arise from the attorney-client relationship established thereafter between Stringer and Kemp.

At the time of his arrest, Kemp was employed as a taxicab driver for the Radio Cab Company of Anchorage, Alaska. Shortly after his arrest Kemp notified his employers that he was being held in jail. After receiving notification that Kemp was being held in custody, the owners of the Radio Cab Company, James M. Lewis and Vernon Oscar Rollins, made efforts to aid Kemp. To this end they undertook to arrange an attorney for him, and Herald Stringer was chosen.

On the morning after Kemp's arrest, Stringer and Rollins together visited Kemp at the Federal jail. There a discussion took place which Kemp recalls concerned two things. It was arranged that Stringer was to represent Kemp and a fee was set for these services, and Stringer was informed of the circumstances under which Kemp had been apprehended. It is in dispute as to what arrangements were agreed upon by Stringer and Kemp as to the fee, or to what extent Stringer would represent Kemp. Whether Stringer was to undertake the defense of Kemp on the criminal charge and to receive for this a fee of $500, or whether a $100 fee was given to Stringer for arranging bail for Kemp is in issue.

Kemp was later arraigned before the United States Commissioner at Anchorage, Alaska, and bail was set in the amount of $2,500. On July 7, a surety was secured and Kemp was released from jail. After his release he immediately reported the office of the Radio Cab Company where he discussed his arrest with James Lewis. Lewis had confidence in Stringer and suggested to Kemp that Stringer might be able to keep the case out of Court. Thereupon, Lewis and Kemp together called at the law offices of Stringer and his associate Connolly, in the Central Building, Anchorage. This was to be the second meeting between Kemp and Stringer.

At this meeting the circumstances of the criminal charge then pending against Kemp were again discussed with Mr. Stringer. The amount of the fee that Mr. Stringer was to receive for his services in

Kemp's behalf was also discussed. It was finally agreed that Stringer was to represent Kemp for a fee of $2,500. Whether there were any conditions to the fee in the full amount of $2,500 is in controversy, and it is also in dispute as to what arrangements were made then for payment of the fee. Kemp recalls that $2,000 of the fee was conditioned on Stringer's ability to get the case dismissed out of Court and to recover Kemp's chauffeur's license. The chauffeur's license was important to Kemp, particularly so since he was employed by the Radio Cab Company and would be unable, in the absence of the chauffeur's license, to continue his occupation. Kemp also recalls that he was to pay Stringer $500 in cash and the remaining $2,000 was to be secured by two notes, each in the amount of $1,000.

The amount of the fee seems to have given Kemp some concern for at a later date, he consulted another attorney. This attorney, Mr. Peterson, advised Kemp that Stringer's fee was too high, and that he, Peterson, would undertake the defense of Kemp for $250. Kemp did not terminate his arrangements with Mr. Stringer, however, and called at the office of Stringer and Connolly from time to time for further meetings or conferences.

In accordance with the agreement, two notes which were intended to be security for the greater part of the fee, were drawn up sometime after the first meeting in Mr. Stringer's office. These notes, each for $1,000, were signed June 17, 1952 by Kemp, and on the same date, one of these $1,000 notes was

cosigned jointly by Mr. and Mrs. Smith, who were close friends of Kemp.

Within a few days after the notes were signed, the criminal proceeding against Kemp was dismissed by the United States Commissioner at Anchorage, at the recommendation of the United States Attorney, Mr. Buckalew. Efforts to recover Kemp's chauffeur's license were not successful, for despite the dismissal of the proceeding against Kemp, his license was retained by the Anchorage police.

Failure to recover the chauffeur's license led to a dispute between Stringer and Kemp. Payment of the notes by Kemp was not forthcoming, which led Stringer to notify the cosigners, Mr. and Mrs. Smith, that he intended to take action if necessary to compel satisfaction. Kemp then consulted Roger Cremo, an Anchorage attorney, and was referred by Cremo to the United States Attorney.

After some investigation, an Information was filed by Mr. Buckalew in the District Court for the Third Division, Territory of Alaska. This Information was not published and within a short time was withdrawn and a new Information filed. It was on this second Information that Stringer was tried in the District Court, and from the judgment of the District Court this appeal has been taken. The opinion of the District Court is reported at 124 F. Supp. 705. After this appeal was docketed a motion was made by appellant to remand the proceedings to the District Court with directions to refer the proceedings to the Alaska Bar. See *Stringer v. United States,* 255 F. 2d 676.

ISSUES PRESENTED.

Appellant has raised two issues which are set forth on page 7 of his brief. The first contention urged by the appellant is that the record contains insufficient evidence to support the Findings of Fact of the District Court. The second issue raised by the appellant questions the validity of the proceedings themselves. Appellant contends that he has not been afforded a fair and impartial hearing by the trial judge. The issues then are:

I. Does the record contain the necessary evidence to support the Findings of Fact?

II. Was appellant afforded a fair and impartial hearing by the District Judge?

ARGUMENT.

I.

DOES THE RECORD CONTAIN THE NECESSARY EVIDENCE TO SUPPORT THE FINDINGS OF FACT?

Herald Stringer has been brought into the District Court of the Third Judicial Division, Territory of Alaska, on charges of misconduct while in practice of his profession. Mr. Stringer had undertaken the defense of Robert Lee Kemp in a criminal matter, and from this attorney-client relationship stem the charges of misconduct.

The circumstances surrounding the setting of the fee by Stringer appear to be in some confusion and have caused a great deal of conflict. Much of the

testimony of the witnesses during the hearing was on this point. The written opinion of the District Judge clearly indicates the Judge's concern in the matter. Several of the Findings of Fact and Conclusions of Law deal in some part with the fee set by Mr. Stringer in the case of United States v. Kemp. In fact, appellant contends that the validity of one of the Findings of Fact will be controlling on this appeal (Appellant's Brief, p. 35). Findings of Fact II, III and IV and Conclusions of Law III, IV, V and VI are related directly to the attorney's fee.

An examination of the testimony as it is taken from the record discloses that no less than five witnesses testified more or less substantially about how the fee in the Kemp case was arrived at. Two of the five witnesses were for the Government. They were Robert Lee Kemp and Vernon Oscar Rollins. For the defense, the defendant himself testified, as did his partner, John Connolly, and finally, James Lewis. Examination of the testimony of each of the five witnesses discloses that the testimony of each will somehow differ from the testimony of the others, and in the testimony of each can be found some similarity of the others. Since the circumstances surrounding the setting of the fee are so important, the testimony of each witness will be taken up in the order of their appearance during the hearing.

Robert Lee Kemp.

Robert Lee Kemp testified on behalf of the Government, and he was admittedly the most important

witness called by the Government. Kemp recalled in his testimony that his first meeting with Herald Stringer took place at the Federal jail on the morning of May 6, 1952. He testified that present at that time, in addition to Mr. Stringer and himself, was Vernon Oscar Rollins, his employer (Tr. Vol. II, p. 267). Kemp was under arrest for having transported a woman for the purpose of prostitution. At the meeting in the jail, Kemp testified that Stringer set his fee to undertake Kemp's defense at $500. One hundred dollars was paid immediately by Rollins to Stringer as a retainer. According to Kemp, the discussion included an explanation of the circumstances which surrounded his arrest (Tr. Vol. II, pp. 267-268).

Kemp further testified that after his release from jail, he reported to the offices of the Radio Cab Company, where he then discussed his arrest with James Lewis. Mr. Lewis suggested that Stringer was a good attorney, and that possibly Stringer could keep the case out of Court. Kemp believed Lewis to be known to Stringer, and for this reason requested Lewis to join him in a visit to Stringer's office (Tr. Vol. II, pp. 272-273). There a second meeting took place between Kemp and Stringer. Present at the second meeting were James Lewis, Herald Stringer, Robert Kemp, and possibly John Connolly (Tr. Vol. II, p. 275). This time, Kemp testified Stringer demanded a fee of $2,000 in addition to the $500 which had already been agreed upon. The purpose of the additional $2,000 was to keep the case out

of Court and to recover Kemp's chauffeur's license (Tr. Vol. II, pp. 277-278). Kemp then went on to testify that arrangements were made to secure the payment of the fee to Mr. Stringer.

There were other meetings between Stringer and Kemp. At one of these later meetings, Kemp testified that the notes were drawn up which were to secure the remainder of the fee (Tr. Vol. II, p. 287). Shortly before the case was dismissed by the United States Commissioner, Lewis came to where Kemp was working to get his signature on the notes and to get the signatures of the cosigners, Mr. and Mrs. Smith. He and Lewis together went to Mr. Smith's place of employment, and Smith there declined to sign the note. Later during the same day, Lewis and Kemp met with Mr. and Mrs. Smith at the Smiths' residence, and at that time and place the Smiths jointly signed the note as cosigners (Tr. Vol. II, p. 289).

The material part of Kemp's testimony relating to the negotiations which took place between himself and Stringer at arriving at the fee are set out below. In his direct examination, Kemp was questioned concerning what was said at the meeting where he first met Stringer, and which took place at the Federal jail.

By Mr. Fitzgerald:

Q. Now, what discussion took place down there at the jail?

A. Well, as I say, I related to Mr. Stringer the circumstances of my arrest and we discussed the case and Mr. Stringer said he wanted $100 retainer fee and Pat Rollins gave him the $100

retainer fee and he said the fee for his services would be $500 and at that time, why, Pat had taken the $100 out of his pocket and gave it to Mr. Stringer.

The Court. Just a moment, please. May I interrupt at this point, Mr. Fitzgerald? Now what did you understand that was to pay at that time?

A. Well, the way I thought it was was this $500 would have been to represent me in case I came to court.

The Court. On the trial of the case in chief, or that is on the trial of the case?

A. Or anything he had to do for me.

The Court. Very well.

Mr. Fitzgerald. Is the Court satisfied with the answer of this witness?

The Court. Yes, the Court is, you may proceed, Mr. Fitzgerald.

By Mr. Fitzgerald:

Q. Was there any other discussion at that time?

A. You mean besides the case?

Q. Besides the case and besides the fee?

A. Not that I recall, although—of course, Mr. Stringer told me, I believe that he told me at that time, but I don't want to swear to it that was approximately the time he told me or whether it was in the afternoon when I was in his office, he told me it was a tough case to beat because of the fact that I was a cab driver and there had been quite a few cab drivers getting arrested and public opinion was against them. Now, this conversation might have occurred then or afterwards when I was in Mr. Stringer's office.

Q. Well, Mr. Kemp, can you tell me how well you remember this first meeting down in the jail? How well you remember the conversation that took place?

A. Well, as far as the conversation is concerned I am positive that Mr. Pat Rollins gave Mr. Stringer $100 retainer fee and that at that time Mr. Stringer said it would cost $500 for his services.

(Tr. Vol. II, pp. 267-269.)

There is no doubt in Kemp's mind as to what arrangements had been made at the Federal jail, as is shown by his further testimony.

By Mr. Fitzgerald:

Q. And how did you happen to go to see Mr. Stringer?

A. Well, Mr. Lewis and Pat Rollins had engaged him for me and the way I understood it at the time that he engaged me down at the City Jail, why I figures that he was being engaged for the entire proceedings for me.

Q. And you felt that you were going up to see your attorney?

A. Yes, sir.

(Tr. Vol. II, p. 272.)

Kemp testified that at either his first or second meeting in Stringer's office, the subject of fees was discussed again.

By Mr. Fitzgerald:

Q. Now, regardless of if it was the first or second meeting, will you tell the Court what was

said about the fees that you can recall at this time?

A. Well, I can recall Mr. Stringer told me if it didn't come to court it would cost me $2,000 plus the $500 that I owed him for representing me. Well, I was never quite sure exactly how that $500 fitted in there.

Mr. Grigsby. Let me have that answer.

The Court. $2,000 plus $500 and he was never quite sure how that $500 fitted in there.

Q. Mr. Kemp, what other terms were there in this employment contract between you and Mr. Stringer that you can recall?

A. Well, I can't recall the exact words, but the main part of it was that I didn't have $2,000 and I didn't know where I could get it and he suggested some notes and to have me have a co-signer and it was two notes; one for $1,000 which I would sign and $1,000 note with the cosigner.

Q. Were those notes signed at that time?

A. No, sir, they weren't.

Q. They were discussed?

A. Yes, sir.

Q. Do you recall any other terms of your employment contract with Mr. Stringer?

A. Well——

Q. Do you recall what he was to do for you—each and everything that he was to do for you? Did you discuss that?

A. Yes, I believe we did.

Q. Can you recall now?

A. Mr. Stringer was going to try to keep the case out of court for me and get my chauffeur's license back for me.

Q. And for that he was going to charge you how much?

A. Altogether, it would have totalled $2,500.

Q. Was he to do anything else for you?

A. No, I can't recall of anything. I won't say that there wasn't anything more discussed, but I can't remember everything that was discussed, but that was the main thing I can remember.

(Tr. Vol. II, pp. 277-278.)

Kemp's testimony at this point indicated that he believed the contract provided for Stringer to represent him for $500, but that if the case were kept out of court and if Mr. Stringer could recover his chauffeur's license, an additional $2,000 would be required. Kemp testified further about his understanding of the arrangement.

By Mr. Fitzgerald:

A. I left Mr. Peterson's office with Jim Lewis and we had a discussion about merits and Mr. Peterson defending my case and for the fee that he asked, which was quite a bit less than Mr. Stringer's and I and Jim Lewis both agreed it would be much better if possible to keep me out of court and engage Mr. Stringer to do so, rather than to take Mr. Peterson's offer of defending me for $250 and going to court on it.

Q. And when is the next time you saw Mr. Stringer?

A. We saw him that same day.

Q. You went back to see Mr. Stringer?

A. Yes, sir.

Q. And what discussion took place then?

A. I believe then we discussed the notes some more and who I would get as a cosigner and I suggested Mr. and Mrs. Smith and I believe he agreed to it.

(Tr. Vol. II, p. 286.)

Kemp's reluctance to have the case come to Court and his belief that it would be desirable if the case could be kept out of Court entirely is explained by his testimony as follows:

By Mr. Fitzgerald:

A. Well, he told me that if he didn't sign the notes so as to engage Mr. Stringer to keep the case out of court that I could stand a very good chance of getting indicted by the grand jury and a very good chance of getting convicted and he emphasized it because Mrs. Smith didn't want to sign the notes. She thought it was way too much money and although Mr. Smith was reluctant he was willing to sign them. I guess he didn't want to see me in any more difficulties and we had to convince her so we had quite a discussion on it as to what would happen to me if he didn't sign the notes.

Q. As I understand it now, it was Lewis that made these allegations, is that correct?

A. Yes.

Q. Did Mr. Stringer ever make them?

A. No.

Q. Mr. Lewis did though?

A. Only, not at that time, no. Mr. Stringer told me before that if the case would come to court I would stand a chance of getting indicted by the grand jury and if I did get convicted I would stand the chance of getting from 2 to 5 years. That was the penalty of it.

(Tr. Vol. II, p. 290.)

Kemp believed also that part of the fee was for getting his chauffeur's license back.

A. Well, I had—the only connection I can see in that was the fact that I had always understood that part of that fee was that I was paying him on the agreement of paying him that $2,000 if he—that I was to get the case dismissed and he was going to get my chauffeur's license and within that time, why, he told me that he hadn't agreed to get my chauffeur's license because he had no control over whether or not my chauffeur's license could be issued for me. He said the most he could do was to try to get them issued.

(Tr. Vol. II, p. 300.)

Kemp was examined by the Court in connection with the fee.

By the Court:

Q. What was the first time you ever discussed your chauffeur's license with Mr. Stringer, if you recall?

A. I believe the first time I discussed my chauffeur's license with Mr. Stringer was about the first meeting we had in Mr. Stringer's office and when we were discussing getting it dismissed out of court and I believe at the time he told me that with the dismissal I shouldn't have any trouble obtaining my chauffeur's license.

Q. Was that to be considered in the original $500 fee?

A. No, sir, the fee—that was for $2,000 to get my case dismissed out of court.

Q. He didn't agree with the fee of $500 to get your chauffeur's license back?

A. No, sir, never mentioned that.

(Tr. Vol. II, p. 304.)

The testimony of Robert Lee Kemp is briefly summarized. Kemp testified that he met Stringer for the first time at the Federal jail on May 6, 1952. At that time Kemp employed Mr. Stringer as attorney to defend him on a criminal charge. The fee was set at $500, on which $100 was immediately paid. Some discussion took place at that time regarding the merits of the case.

A second meeting between Kemp and Stringer took place at Stringer's law office. During this meeting, Kemp was given to understand that if the case came to Court he would be in difficulty; that he might be indicted and receive a two to five year sentence. He wanted in the worst way to keep the case out of Court and he was willing to pay $2,000 to do so. Moreover, it was his belief that if the case were kept out of Court he would be able to recover his chauffeur's license which was held by the city police.

It was understood then that Kemp was to pay $500 down in cash and was to pay $2,000 more at the conclusion of the case. The conditions for the additional $2,000 payment were that Stringer was to get the case dismissed or to keep the case out of Court, and was to recover Kemp's chauffeur's license. James Lewis paid $100 in Kemp's behalf toward the $500 immediately due. It was also understood that the $2,000 was to be secured by two notes, of which one would be cosigned, and the notes were to be drawn up at a later date.

Subsequent to this meeting, other meetings took place between Stringer and Kemp. Shortly before

this case was dismissed, James Lewis looked Kemp up and brought the notes for Kemp to sign. Kemp signed the notes and later the same day he and Lewis were able to secure the signatures of Mr. and Mrs. Smith as cosigners for one of the notes.

A few days later friends of Kemp called him to notify him that a notice had appeared in the press that the case had been dismissed. Kemp called Stringer's office and obtained an appointment. Stringer then confirmed that the case against Kemp had been dismissed. Kemp finally testified that Stringer was not able to recover the chauffeur's license and that he had not paid the notes to Stringer.

John Connolly.

The first witness for the defense to testify about the arrangements between Stringer and Kemp was John Connolly. Mr. Connolly had been in partnership with Mr. Stringer since June 1, 1952. He was not present at the meeting in the Federal jail, but testified that he was present in Mr. Stringer's office when the $2,500 fee was set. Mr. Connolly testified also that the conversation included some discussion about the merits of the case, and that Kemp was advised of the maximum and minimum penalties under the statute that he was charged with. Kemp was advised, Mr. Connolly stated, that Mr. Stringer might be able to get the case dismissed. The possibility of dismissal was, however, not considered in connection with the fee. Kemp arranged to pay $100 on the fee sometime during the day. There was no discussion whatsoever about any notes (Tr. Vol. III, pp. 484-485).

According to Mr. Connolly, the return of Kemp's chauffeur's license was not a condition of the $2,500 fee, although he stated that on one occasion Kemp was told that the case was being dismissed and Connolly then promised that he would go over and try to get the chauffeur's license back from the Chief of Police (Tr. Vol. III, p. 491). At the same meeting, Mr. Connolly stated, Mr. Stringer was informed by Kemp that he did not have the money to pay the additional $2,000 and it was therefore arranged that Kemp would sign two notes for $1,000 each. One of the notes was to be cosigned by friends of Mr. Kemp (Tr. Vol. III, p. 496).

James Lewis.

Lewis testified that he was the manager of the Radio Cab Company and had been the dispatcher on duty at the time of Kemp's arrest. After Kemp was released from jail, Lewis and Kemp held a conversation at the taxicab office (Tr. Vol. III, p. 576). In the conversation in the cab offices, Kemp inquired of Lewis about an attorney and in response to this inquiry Lewis suggested Mr. Stringer. Lewis denied, however, on cross-examination that he suggested that he might be in a position, because of his acquaintance with Stringer, to obtain the services of Stringer at a favorable fee (Tr. Vol. III, p. 594).

Lewis attended the meeting in Stringer's office when the $2,500 fee was set. Lewis testified that the fee of $2,500 was subject to no conditions whatsoever. According to Lewis, the fee was set at $500 in cash

then and $2,000 to be paid at the conclusion of the case. Lewis testified that he put up the $100 that was paid to Stringer toward the $500 immediately due. Mr. Lewis also stated that there was no mention made of any promissory notes at the meeting (Tr. Vol. III, pp. 579-581).

On cross-examination Lewis was questioned about the notes executed by Kemp. He recalls that the only discussion about notes took place at the final meeting (Tr. Vol. III, p. 606). Lewis recalls that at this meeting Kemp was advised by Stringer that the case was being dismissed and informed Kemp that the balance of the fee should be forthcoming. Kemp told Stringer that he did not have that kind of money. Stringer wanted collateral for the balance of the fee, and then, for the first time, Lewis states, discussion about the notes took place. Stringer wanted a note for $2,000, but Kemp advised Stringer that his friends would not sign a note for $2,000 and therefore, two notes were made, of which one was cosigned (Tr. Vol. III, pp. 607-608). Lewis was asked if he might explain how it was known that the Smiths would not sign the note for $2,000, and that it would be necessary to make two notes of $1,000 each. Lewis then became confused, as shown by his testimony.

> The Court. Just a moment, please. Was there anything said at that time that they wouldn't sign the $2,000 note?
>
> A. I believe there was.
>
> The Court. What was the discussion about?
>
> A. They were skeptical about signing a $2,000 note.

The Court. Who?

A. The Smiths, according to Mr. Kemp. He said that the Smiths, or they either said, or it was presumed that they were skeptical of signing a $2,000 note.

The Court. Now, was that discussed at that time?

A. The note, you mean?

The Court. No, the signing of the note by the Smiths, the $2,000 note.

A. No, I don't believe it was. Let me see—I don't know whether—it could be that it is a presumption on my part that I got that in my mind, I don't know which, that they would not go the $2,000 note because I am thinking back. I found out later they didn't want to sign the $2,000 note.

The Court. And didn't you find that out while discussing that feature of the case with counsel?

A. I don't know whether I did or not.

(Tr. Vol. III, pp. 608-609.)

To summarize Lewis' testimony, he first recommended Stringer to Kemp. He went to Stringer's office with Kemp and a fee was set in the amount of $2,500, of which $500 was immediately required. He loaned Kemp $100 to pay on the $500 then due. Lewis was present at almost all of the meetings, with the possible exception of one. He was present at the final meeting when he states Stringer advised Kemp that the case against him was to be dismissed and demanded the remainder of his fee. Lewis testified that Kemp then let Stringer know that he did not have that kind of money, and for the first time, the question of what arrangements should be made to

secure payment of the remaining $2,000 was discussed. He states that although Stringer wanted a $2,000 note, Kemp refused since Kemp's friends, the Smiths, would not sign a $2,000 note. Two notes were then drawn in the amount of $1,000 each; one of the notes being cosigned by the Smiths. It is apparent from the testimony of Lewis that he was greatly concerned in the Kemp case. That matter will be treated a little later in this argument.

Herald Stringer.

The defendant took the witness stand on his own behalf and testified in connection with the fee. Mr. Stringer testified that at the Federal jail he received $100, paid on behalf of Kemp, to arrange Kemp's release on bail. There was no discussion at that time about retaining Stringer as counsel in connection with the charge on which Kemp had been arrested (Tr. Vol. IV, p. 768).

Stringer testfied that after Kemp's release from jail, Kemp came to his law office, accompanied by Mr. Lewis, and requested Stringer to defend him. The circumstances concerning the Kemp case were discussed, and Stringer advised Kemp that his case was a serious one. Stringer set a fee in the amount of $2,500, of which $500 was to be paid as retainer (Tr. Vol. IV, p. 769). According to Stringer, nothing was said about Kemp's financial ability to pay. After the fee was set, Stringer requested that the dispatch sheets of the Radio Cab Company be made available, which would corroborate the story of Kemp and

which would tend to exonerate him (Tr. Vol. IV, p. 770).

Stringer testified that the notes were drawn up in his office at the meeting when Kemp was advised that the case was being discussed. The notes were drawn up in the amount of $1,000 each; one of them was taken out by Kemp and Lewis so that the signatures of the cosigners could be obtained (Tr. Vol. IV, pp. 784-785).

On cross-examination Mr. Stringer testified that at the first meeting in his office with Kemp, May 8, 1952, he foresaw the possibility of getting the case dismissed (Tr. Vol. IV, pp. 807-809).

Vernon Oscar Rollins.

The final witness who testified about Mr. Stringer's fee was the Government's first rebuttal witness, Vernon Oscar Rollins. Rollins was part owner of the Radio Cab Company, and as such, one of Kemp's employers.

Rollins was at the first meeting between Stringer and Kemp at the Federal jail. Rollins gave Stringer $100 at this time, and testified as to what his recollection was of the arrangements made at the jail.

By Mr. Fitzgerald:

Q. Can you tell the Court now what you can recall, to the best of your ability, about that discussion?

A. Well, we were talking about a retainer fee for Stringer which was $100 and the conversation has been so long I don't know what it—I cannot

truthfully state what the conversation, how it led around—what it was I don't know.

Q. Well, if you can't recall the words can you tell us in effect what was said?

A. The only thing that I can definitely remember on it is the retainer fee. That is about the conversation I know was in regards to the case, but what it was about I couldn't state what went on.

Q. Could you tell us now about the retainer fee?

A. Well, I think $200 was supposed to have been the original retainer fee, but I had the $100 there and—maybe it was just $100, I don't recall for sure, and that was supposed to be a retainer on $500. That is what I understood.

Q. Do you recall what the $500 was supposed to have been for?

A. That was, as far as I understood, was supposed to be Stringer's fee.

(Tr. Vol. IV, pp. 856-857.)

On cross-examination Rollins again testified as to what his understanding was of the arrangements made at the Federal jail.

By Mr. Kay:

Q. And I believe that you referred to those sums in your direct testimony, did you not, as used the word "retainer" in connection with them?

A. Yes, I was under the impression that the $100 was the retainer on a $500 fee.

Q. Now, is that clear in your mind, definite, or is that as hazy as the other?

A. It is pretty clear.

(Tr. Vol. IV, p. 861.)

Rollins' testimony was that he heard about the $500 fee prior to going to the jail, and that he heard this from James Lewis.

By Mr. Kay:

Q. Well, just reading that portion of the transcript then, Mr. Rollins, are you of a firm impression which I believe you stated previously that the $500 you may have heard, the $500 mentioned, either just before going to the jail or at the jail or just after?

A. I heard the $500 prior to going to the jail.

Q. I see. Did you hear it from Mr. Stringer?

A. Jim Lewis.

Q. All right.

The Court. That is your considered opinion, is it?

A. Yes, sir.

The Court. And what has caused you to testify now that you heard that from Jim Lewis?

A. Jim Lewis was the only person that could have told me. Mr. Stringer did not tell me, and as he sent me up there with the $100 or to go up there for the retainer fee he is the only person I could have heard it from.

The Court. But, it is still your testimony that your understanding was, is it, that the total fee was $500?

A. My understanding was that $500. I not only got that from that one conversation, but afterwards with Jim Lewis and myself. It was my impression.

The Court. Very well.

(Tr. Vol. IV, pp. 875-876.)

The Findings of Fact rest substantially on the evidence heretofore reviewed.

Finding of Fact II:

> On or about the 8th day of May, 1952, there was a contract entered into between the defendant Herald E. Stringer, and Robert L. Kemp, the basis of which was that the defendant would represent Robert L. Kemp on a white slavery complaint which had been filed against Robert L. Kemp for the sum of $500.00, and further, this contract was made when the defendant went to the Federal jail and discussed the case with Robert L. Kemp and Pat Rollins. Defendant was at that time paid $100.00 of the $500.00 fee.

The finding is supported by the testimony of Robert Kemp and Vernon Oscar Rollins. Neither John Connolly or James Lewis, witnesses for the defense, were present at the meeting in the Federal jail. The testimony of Kemp and Rollins is in conflict with that of Mr. Stringer. Mr. Stringer contends that he was employed for the purpose of securing the release of Kemp on bail. According to Kemp, on the first meeting with Mr. Stringer at the jail, the fee was set at $500. He testified that the circumstances of his arrest were related and that the case was discussed (Tr. Vol. II, p. 267). A discussion of the case and the circumstances of the arrest would naturally precede the preparation of a defense.

Finding of Fact III:

> There was a second fee set by the defendant in the sum of $2,500.00 in the defendant's office, the exact time being in dispute.

The testimony of all who took part in the first meetings in Stringer's law office agree that a fee

of $2,500 was set. The dispute in the time appears to be from the uncertainty of the time of Kemp's release from jail and his arrival at Mr. Stringer's office (Tr. Vol. II, pp. 275-277).

Finding of Fact IV:

> That Robert L. Kemp was led to believe that one fee would be charged to settle the case out of Court, where another would be exacted if the case went to trial, thereby implying at least that it would take a greater amount to keep the case out of Court than to try the case in Court.

This is in accord with Kemp's testimony (Tr. Vol. II, pp. 278-300). Apparently Kemp wanted to keep the case out of Court. He was in some fear that if the case went to Court he would be convicted. This fear was expressed to others, as is shown by the testimony of Mrs. Mildred Smith (Tr. Vol. IV, p. 898). For this reason he did not choose to exchange attorneys, since he could have employed Mr. Peterson for $250 (Tr. Vol. II, p. 282). Robert Kemp relied upon Mr. Stringer to keep the case out of Court and he was willing to obligate himself for $2,000 on the possibility that the case might be dismissed. Mr. John Connolly, James Lewis and Mr. Stringer all testified that the fee of $2,500 carried no conditions.

Finding of Fact V:

> That the relationship of attorney-client was established between the defendant and Robert L. Kemp at the time the defendant visited Robert Kemp in the Federal jail.

This finding, of course, depends upon the testimony of Kemp and Rollins. Mr. Stringer would admit that an attorney-client relationship between himself and Mr. Kemp existed only to the extent that he would prepare the necessary bond to secure the release of Kemp from jail.

Findings of Fact VI and VIII are treated together:

> That there was an overreaching of Robert L. Kemp by the defendant, by the defendant taking advantage of Robert L. Kemp's fear, ignorance and lack of experience in the attorney-client relationship.
>
> That the defendant, in violation of the trust and confidence of his client, knowingly failed to advise his client concerning the status, merits and probable outcome of his client's case.

Kemp had little previous experience with either courts or lawyers (Tr. Vol. II, pp. 308-309). He was advised by Mr. Stringer that he faced a very serious charge. His testimony on the point is not disputed by either Mr. Connolly, Mr. Lewis or Mr. Stringer. All agree that Kemp was advised that the charge was a very serious one. Kemp was placed in fear of what might happen to him. He conveyed his fear to Mrs. Mildred Smith, who testified as follows:

By the Court:

> Q. Mrs. Smith, were you afraid at that time of anything, that is, the time that you signed the promissory note?
>
> A. I was afraid that Bobby would go to the penitentiary.

Q. Why were you afraid of that?

A. Well, from the impression in the very beginning, the very beginning, because he wouldn't stand trial they said he didn't have a chance.

Q. He said he didn't——

A. Bobby said he was too scared to have a trial. We begged and begged and he wouldn't have a trial.

(Tr. Vol. IV, p. 898.)

Kemp was charged with the crime of "transporting for the purpose of prostitution." The charging part of the complaint was as follows:

> "The said Robert Lee Kemp in the Territory of Alaska, within the jurisdiction of this Court, did wilfully feloniously and unlawfully, *on the 6th day of May, 1952, at approximately 12:45 a. m. did transport for the purpose of prostitution* contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

The complaint, on its face, is patently defective. It does not state whether it was brought under the territorial statute or the Federal Mann Act. It does not allege that the defendant transported a female from place to place. It does not meet the requirements of either statute (See 65-9-19 ACLA 1949 and 18 U. S. C. A. 2421).

During the first meeting at Mr. Stringer's law office, some inquiry was made into the circumstances surrounding the arrest of Kemp. At that time, it was

determined that the dispatch sheets and the radio log of the Radio Cab Company were available (Tr. Vol. II, p. 598; Tr. Vol. IV, p. 770). Lewis, who had been the dispatcher on the night in question, was present. These dispatch sheets and the radio log would show that Kemp had been dispatched by the Radio Cab Company to pick up his fare. With this information it is questionable whether the Government ever had a case against Robert Kemp. Certainly, the United States Attorney dismissed the matter without any further proceedings. Mr. Buckalew, in his cross-examination, stated that he never seriously intended to prosecute Kemp and that when he became aware of the dispatch sheets, as far as he was concerned, the case was without merit (Tr. Vol. II, p. 395).

Yet all the witnesses who were in a position to know testified that Kemp was informed that the case against him was a tough one, and that he stood a good chance of being indicted and sentenced to imprisonment for a term of two to five years.

Finding of Fact VII:

> That one James Lewis who was part-owner of the Radio Cab Company for whom Robert L. Kemp worked, and who was the dispatcher of the company at the time the original incident occurred, acted for the defendant in his dealings with Kemp.

This finding states simply that James Lewis was acting on Mr. Stringer's behalf. Lewis played an important part in the Kemp case. Rollins stated that

he was advised by Lewis before going to the Federal jail that Stringer wanted $500 and would require a retainer of $100 (Tr. Vol. IV, p. 875). Rollins had the $100 to pay Stringer on the morning of May 6.

Kemp testified that Lewis suggested that Stringer might keep the case out of Court and suggested the first visit to Stringer's law office (Tr. Vol. II, pp. 272-273).

Lewis, by his own testimony, attended every meeting between Kemp and Stringer at Mr. Stringer's office, except that he might have missed one. He went up there at other times on the Kemp case (Tr. Vol. III, pp. 603-605).

James Lewis also accompanied Kemp to Mr. Peterson's office. Kemp testified that Lewis opposed the employment of Mr. Peterson. Further, that Lewis encouraged Kemp to continue the contract with Stringer (Tr. Vol. II, p. 283).

Lewis also took part in getting the Smiths to cosign Kemp's note for $1,000. Kemp's testimony is that Lewis brought the notes to Kemp's place of employment to get the note signed; that Lewis went with him to Mr. Smith's place of employment to get the note signed, and when this failed Lewis accompanied Kemp to the Smiths' residence to get their signatures on the notes (Tr. Vol. II, p. 287). Mrs. Smith testifies on that instance as follows:

By Mr. Fitzgerald:

Q. Now, can you recall any of the statements that Mr. Lewis made at that time?

> A. Well, as much as I can remember, he just said—Mr. Lewis said if Bobby didn't sign the note for the charges against him that it meant imprisonment from one year to two—or one year to five, I don't remember.

Mr. Lewis paid Mr. Stringer $100 at the time the fee of $2,500 was set. Kemp did not have the money. Lewis testified that the notes securing $2,000 of the fee were not drawn up until the last meeting. John Connolly and Herald Stringer also testified to the same effect. Kemp testified that the notes were discussed soon after the $2,500 fee was set in Stringer's office, and that the notes were drawn up sometime between then and the final meeting, when he was told that the case was dismissed. Lloyd Arthur Smith testified that the notes had been discussed prior to the time that they were brought to him to sign (Tr. Vol. IV, p. 927).

The conflict in the testimony in the *Stringer* case is apparently irreconcilable. Some explanation is possible when it is understood that the events took place in May, 1952, and the proceedings against Mr. Stringer did not come to trial until June 17, 1954.

In his opinion the trial judge stated that although witness Kemp was impeached in certain respects, his testimony was not completely deprived of value (Tr. Vol. I, p. 121). This appears to be in accord with the general rule that the trier of fact need not reject the entire testimony of a witness who has been impeached (*Liberty Mutual Insurance Company v. Thompson,* 171 F. 2d 723).

Judge McCarrey found, on the other hand, that the defense had failed to produce evidence which he felt was within their power to produce. The judge further stated that there was a lack of inconsistency and spontaneity. As he said in his opinion, "This absence of inconsistencies and lack of spontaneity persuade me that the defense witnesses were exceedingly well-rehearsed at pre-trial discussions and precluded me from giving their testimony too much weight." (Tr. Vol. I, p. 122). The credibility of witnesses in a disbarment proceedings is a question to be determined by the trial judge. (*In re Salus,* 184 A. 69). As a general rule, in any proceedings the responsibility for determining credibility of the witnesses is placed upon the trier of fact.

The Findings of Fact in the disciplinary proceedings against Herald Stringer rest upon the testimony reviewed. The Findings of Fact of the trial judge of the disciplinary proceedings will not be disturbed if they rest upon sufficient evidence (*Wilhelm's* case, 112 A. 560, 562). The Court of first instance knows the lawyer, his standing, character, credibility and fidelity to trust in a way that the Appellate Court cannot (*In re Salus,* 184 A. 69, 70).

II.

WAS APPELLANT AFFORDED A FAIR AND IMPARTIAL HEARING BY THE DISTRICT JUDGE?

The appellant having challenged the sufficiency of the evidence then directs his attack to the manner

in which the case was tried by the judge. Appellant claims that he did not have a fair trial and charges misconduct on the part of the judge. Several grounds are relied upon. First, appellant urges that the District Judge should have disqualified himself from hearing the case. Secondly, appellant argues that the District Judge acted improperly and that he assumed to act both as prosecutor as well as judge in the trial of the case. Finally, it is urged by appellant that the District Judge demonstrated his bias and prejudice against the defendant throughout the trial.

Judge McCarrey, on February 2, 1954, sent the file in the *Stringer* case from the Third Judicial Division of the Territory of Alaska to the Fourth Judicial Division. It was the intention of Judge McCarrey that the matter would be heard by Judge Pratt, who would come to Anchorage. Judge McCarrey was reluctant to hear the *Stringer* case because of his own personal relationship with Herald Stringer and therefore intended to disqualify himself. However, Judge Pratt refused to hear the matter and returned the file of the case to the Third Judicial Division, Anchorage, on February 4, 1954 (Tr. Vol. I, pp. 152-153).

Counsel for appellant then sought to invoke provisions of the territorial law permitting referral of charges against attorneys to three disinterested members of the Bar Association. If such referral were made, the evidence would be taken by a committee of the Bar and in due time, the recommendation of the committee would be filed with the District Court. The pertinent section of the Alaska Code pro-

viding for this procedure is found at Section 35-2-77 ACLA 1949.

Judge McCarrey denied the defendant's motion of reference and filed a Memorandum Opinion in accordance with his decision on March 4, 1954 (Tr. Vol. I, pp. 58-62). In his Memorandum Opinion, Judge McCarrey pointed out that he had previously expressed his own personal opinion that he should disqualify himself because of political and personal relationships with Herald Stringer. The Court stated that although he personally was of the opinion that he should disqualify himself, counsel for Stringer had repeatedly expressed their opinion that he was qualified to hear the case, and on these expressions as well as his inability to refer the matter to the Bar, the Court felt that it was his duty to hear the matter (Tr. Vol. I, p. 61). It is at once apparent that Judge McCarrey was reluctant to try the *Stringer* case and would have disqualified himself, but that he also felt it was his duty under the existing circumstances to hear the case.

The judge left a way out, however, should either litigant wish to make objection. In the concluding part of his Memorandum Opinion, Judge McCarrey allowed both parties three days in which to file an Affidavit of Disqualification if they so desired. Judge McCarrey strongly indicated that if such an affidavit were filed, the *Stringer* matter would be referred to Judge Folta of the First Judicial Division (Tr. Vol. I, p. 62). No affidavit was ever filed.

Disqualification of a District Judge may be accomplished under Federal statutes in either of two different ways. One of the two methods is applicable to the Territory of Alaska and the other is not. Both provisions spring from the same source and are found as Sections 20 and 21 of the Judicial Code, commonly referred to as the Act of March 3, 1911, 61st Congress, 36 Stat. 1090.

Section 21 of the Act of March 3, 1911 may now be found at 28 U. S. C. 144. Under this provision of law, either party to a proceedings in District Court may file an Affidavit of Personal Bias and Prejudice against the judge before whom the matter is then pending. If the affidavit is sufficient, the judge will be disqualified and another judge assigned to hear the proceedings. This statute does not apply to the Territory of Alaska (*Tjosevig v. United States* (CA 9) 225 F. 5).

Section 20 of the Act of March 3, 1911 does apply to the Territory of Alaska. It is found in slightly modified form at 28 U. S. C. 455. It has been made applicable to Courts of the Territory of Alaska by the enactment of law found at 28 U. S. C. 460. There are few annotations to this particular section of the Judicial Code. It has been held, however, that the failure of a District Judge to disqualify himself is not jurisdictional, nor are his actions void merely because of the existence of a disqualifying ground. It appears that the consent of the parties will authorize a judge subject to the statute to continue in the exercise of

his jurisdiction (*Utz & Dunn Company v. Regulator Company* (CA 8) 213 F. 315).

The decision of a trial judge to disqualify himself or not is left to his own judicial discretion. It must be shown that his discretion is arbitrary or capricious in order to constitute reversible error (*Voltman v. United Fruit Company* (CA 2) 147 F. 2d 514).

It may or may not be that on the facts of the *Stringer* case that a disqualifying ground existed under which Judge McCarrey might have disqualified himself. It should not be necessary to decide that question since appellant has failed to make an adequate showing that in his discretion Judge McCarrey acted either arbitrarily or capriciously. It appears that both sides apparently consented, in fact, to trial of the case before Judge McCarrey (Appellant's Brief p. 46).

The Code for the Territory of Alaska includes an act under which a party litigant may move to disqualify a judge in a proceedings for reasons of bias or prejudice. That provision of the law of Alaska is found at 54-2-1 ACLA 1949. It is necessary, if a party litigant is to avail himself of this Act, that an affidavit of bias or prejudice be filed. No attempt was made at any time to invoke this grounds in order to disqualify Judge McCarrey (Appellant's Brief, p. 46).

That Judge McCarrey may have ruled adversely to appellant is not grounds to rely upon to prove abuse of judicial discretion under 28 U. S. C. 455

(*Wilkes v. United States* (CA 9) 80 F. 2d 285, 289; *Benedict v. Seiberling,* 17 F. 2d 831, 836).

Appellant's contention that the trial judge committed reversible error in failing to disqualify himself is unsound. Appellant has failed to make an adequate showing that Judge McCarrey, in the exercise of his own judicial discretion, acted capriciously or arbitrarily by failing to disqualify himself, nor did the defense make any effort to disqualify the judge prior to the time of hearing. It appears that the contrary is true and that the defense urged Judge McCarrey to try the case.

Appellant has included in his argument on this point, allegations that other parties besides Herald Stringer were put on trial during the hearing (Appellant's Brief, p. 51). The argument advanced by appellant appears, upon examination, to be outside of the merits of the case on appeal. It bears no relationship to the issue of Herald Stringer's guilt or innocence and should, therefore, be disregarded.

Appellant contends that the trial judge assumed to act during the trial as both prosecutor and judge. The appellant, in order to prove his contentions, sets forth several instances which he believes to demonstrate the soundness of his position. He has pointed out that the trial judge examined the Government's witness Kemp prior to cross-examination by defense

counsel. Further, that the witness Kemp was recalled back to the witness stand by the judge on one occasion.

Counsel next refers to the examination of the defendant Herald Stringer by the judge, and it is suggested that Judge McCarrey interrupted the examination of witnesses in instances too numerous to mention for lack of space (Appellant's Brief, p. 58).

Finally, appellant relies upon the desire of the Court that Kemp remain available to the Court after the conclusion of his testimony. The Court indicated that Kemp might be recalled. From this alleged misconduct appellant argues: That the trial judge had the opportunity to interview Kemp during recesses of the Court and since the judge had assumed to act as prosecutor, it was consistent with that assumption that he interview all his witnesses during recess, in chambers or anywhere else. The inference is clear; it contemplates a most serious charge of misconduct against the trial judge. A charge of this character should not be lightly made and on the record here, is not justified. A trial judge is allowed a good deal of discretion in examining witnesses. Authority seems to support the position that the trial judge is more than an umpire, but has a positive duty in getting at the truth (*Montrose Contracting Inc. v. Westchester County,* 94 F. 2d 580, certiorari denied, 304 U. S. 561; *Ochoa v. United States,* 167 F. 2d 341).

The cases cited above are jury cases. Presumably, a trial judge would be more cautious in examining witnesses before a jury since the jury might be influenced either by the type of questions put, or by the

extent of the examination. Where trial is before the Court, no danger exists of prejudice in the minds of the jury. Very little authority can be found on the precise point. In *Wilhelm's* case (112 A. 560, 562), the Supreme Court of Pennsylvania held that an attorney is an officer of the Court and when his conduct is in question it is proper for a judge to interrogate witnesses.

The appellant contends that the trial judge was hostile to the defendant, and the appellant again takes from the record some of the evidence on which he relies to support the allegation. Counsel contend that the trial judge cautioned the defendant of his oath when the defendant was on the stand (Tr. Vol. IV, p. 771). He states that the hostility and unfairness to Stringer is revealed in part of the opinion written by Judge McCarrey, and sets out the particular part relied upon at page 62 of his brief. The substance of this excerpt of the opinion is that Kemp advised Stringer that he did not have any money; that Stringer agreed to accept a note for $2,000; and pointed out that the Court found that $200 had been paid on the fee of $2,500; and pointed out that it was never explained to the Court why Stringer was willing to accept a $2,000 note when the amount unpaid amounted to the sum of $2,300. The appellant argues that the opinion is, therefore, in conflict with the testimony of the defendant.

And finally, appellant contends the trial judge demonstrated his unfairness by his refusal to allow the defendant to file an exhibit after the defense had

rested their case. The matters relied upon by appellant again appear to be matters in which the trial judg is granted some discretion. For instance, it is within his sound discretion to allow additional evidence to be taken after the litigants have rested their case only if he feels that such evidence is necessary (*Gulf Refining Co. of Louisiana v. Phillips,* 11 F. 2d 961, certiorari denied, 273 U. S. 697; *Philadelphia & T R Co. v. Stimpson,* 39 U.S. 448). In substance, however, the evidence relied upon, as set forth in appellant's brief, to demonstrate the hostility of the District Judge, fails to achieve its end.

It is on the basis of the evidence as set forth in the brief of appellant, and on the record, that grave and serious charges are made against Judge McCarrey. Careful examination of the record does not disclose evidence upon which to base the charges which have been made. This appeal should not be the occasion or provide, perhaps, the opportunity to make such charges.

CONCLUSION.

The trial Court found that Herald Stringer, as an attorney at law, was guilty of practices which justified his suspension from his profession for 120 days.

It was in the Judge's discretion to give the testimony of the witnesses such credibility and weight as appeared to him to be justified. The testimony of the witnesses is beyond reconciliation, and left the trial judge with the alternative of selecting the testi-

mony of either one group of witnesses or the other. In the main, the Judge accepted the testimony of Robert Kemp, Vernon Oscar Rollins, Lloyd Smith and Mrs. Smith as against the testimony of the defendant, Herald Stringer, John Connolly, his partner in the practice of law, and defense witness James Lewis.

The appellant has failed to show that Judge McCarrey should have disqualified himself, and their attempts to show he was hostile to the defendant and conducted himself improperly are not justified on the grounds set forth by appellant. In the final analysis, however, the case must be reviewed and determined on the record as a whole. Appellee rests on the record itself to sustain the judgment of the trial Court.

Dated, Anchorage, Alaska,
December 13, 1955.

Respectfully submitted,

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